



6450-01-P

DEPARTMENT OF ENERGY

10 CFR Parts 430 and 431

[Docket No. EERE-2012-BT-TP-0003]

RIN: 1904-AC70

Amendments and Correction to Petitions for Waiver and Interim Waiver for Consumer Products and Commercial and Industrial Equipment

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: In this final rule, DOE amends portions of its regulations governing petitions for waiver and interim waiver from DOE test procedures to restore, with minor amendments, text inadvertently omitted in the March 7, 2011 certification, compliance, and enforcement final rule. Additionally, the rule adopts a process by which other manufacturers of a product employing a specific technology or characteristic, for which DOE has granted a waiver to another manufacturer for a product employing that particular technology, would be required to petition for a waiver. The rule also sets forth a process for manufacturers to request rescission or modification of a waiver if they determine that the waiver is no longer needed, or for other appropriate reasons; adopts other minor modifications to the waiver provisions for both consumer products and industrial equipment; and clarifies certain aspects related to the submission and processing of a waiver petition.

DATES: The effective date of this rule is **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: The docket, which includes Federal Register notices, comments, and other supporting documents/materials, is available for review at regulations.gov. All documents in the docket are listed in the regulations.gov index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

A link to the docket web page can be found at:

<http://www.regulations.gov/#!docketDetail;D=EERE-2012-BT-TP-0003>. This web page will contain a link to the docket for this notice on the regulations.gov site. The regulations.gov web page will contain simple instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket, contact Ms. Brenda Edwards at (202) 586-2945 or by email: Brenda.Edwards@ee.doe.gov.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Authority

Title III of the Energy Policy and Conservation Act of 1975 (“EPCA” or the “Act”), Pub. L. 94-163 (42 U.S.C. 6291 *et seq.*), as amended,¹ sets forth a variety of provisions designed to improve energy efficiency. Part A of Title III (42 U.S.C. 6291–6309) provides for the Energy Conservation Program for Consumer Products Other Than Automobiles. The National Energy Conservation Policy Act (NECPA), Pub. L. 95-619, amended EPCA to add Part A-1 of Title III, which established an energy conservation program for certain industrial equipment. (42 U.S.C. 6311–6317)²

This final rule involves the regulatory provisions governing the submission and processing of test procedure waivers for both consumer products under Part A of EPCA and industrial equipment under Part A-1. EPCA directs DOE to prescribe test procedures that are reasonably designed to produce results reflecting the energy efficiency, energy use, and estimated annual operating costs for those products, and that are not unduly burdensome to conduct. 42 U.S.C. 6293(b)(3), 6314(a)(2). DOE’s regulations in Title 10 of the Code of Federal Regulations (CFR), Section 430.27 (consumer products) and Section 431.401 (commercial

¹ All references to EPCA in this final rule refer to the statute as amended through the American Energy Manufacturing Technical Corrections Act (AEMTCA), Pub. L. 112-210 (Dec. 18, 2012).

² For editorial reasons, Parts B (consumer products) and C (commercial equipment) of Title III of EPCA were re-designated as parts A and A-1, respectively, in the United States Code.

equipment) contain provisions allowing a person to seek a waiver from the test procedure requirements if certain conditions are met. A waiver allows manufacturers to use an alternative test procedure in situations where the DOE test procedure cannot be used to test the product or equipment, or where use of the DOE test procedure would generate unrepresentative results.

II. Background

On December 17, 2012, DOE published a notice of proposed rulemaking (NOPR) (77 FR 74616) to propose amendments and corrections to portions of its regulations governing petitions for waiver and interim waiver from DOE test procedures. The NOPR proposed to restore, with minor amendments, text inadvertently omitted during another rulemaking and proposed a process by which, after DOE grants a waiver for a product employing a particular technology, other manufacturers of that product employing a technology or characteristic that results in the same need for a waiver would submit a petition for waiver. The NOPR also set forth a process for manufacturers to request rescission or modification of a waiver if they determine that the waiver is no longer needed, or for other appropriate reasons. DOE also proposed to make other minor modifications to the waiver provisions for both consumer products and commercial equipment and to clarify certain aspects related to the submission and processing of a waiver petition. This final rule adopts, with minor modifications, those proposals. The amendments are described in more detail in Section III.

III. Discussion of Specific Revisions to Waiver Provisions

In this final rule, DOE is adding an introductory paragraph to 430.27(a) and 431.401(a) to clarify that obtaining a waiver or interim waiver does not exempt a manufacturer of consumer products or commercial equipment from compliance with any other applicable regulatory requirements contained in 10 CFR parts 430 and 431, or the certification and compliance requirements of 10 CFR part 429. While a test procedure waiver or interim waiver provides an alternate test method for a particular basic model, a waiver cannot provide an alternative metric by which to certify compliance with an applicable standard or make representations as to the energy and/or water use of that basic model. The modifications to sections 430.27(a) and 431.401(a) clarify that a waiver or interim waiver cannot change the metric by which the energy use or efficiency of a basic model is described. This language affirms that a waiver is solely an authorization to use an alternative test method and does not relieve the manufacturer from any other regulatory requirements. The Association of Home Appliance Manufacturers (AHAM) commented that this clarification represents AHAM's understanding of current practice and, thus, did not oppose adding the express statements to the regulations. (AHAM, No. 4 at p. 2)

With regard to waiver applications for commercial equipment addressed in part 431, DOE is modifying section 431.401(a)(1) to expand the waiver provisions to apply to manufacturers of all types of covered commercial equipment, rather than just the five types of equipment currently listed (i.e., commercial warm air furnaces; commercial packaged boilers; small, large, and very large commercial package air conditioning and heating equipment; packaged terminal air conditioners and packaged terminal heat pumps; and commercial water heaters and hot water supply boilers (other than commercial heat pump water heaters); collectively, commercial HVAC and WH equipment). As a related action, DOE is amending the

definition of “private labeler” in section 431.2 to reflect that the term applies to all products covered under part 431, and not only to commercial HVAC and WH equipment, as the definition currently states. Because this term could be applicable to persons who may submit petitions for waivers, or entities potentially affected by waivers issued under section 431.401, this change will ensure that the term is applied uniformly to all products. AHAM supported DOE extending the ability to obtain waivers to manufacturers of other commercial equipment, such as commercial clothes washers. (AHAM, No. 4 at p.7) AHAM also stated that it did not oppose DOE amending the definition of private labeler in part 431. (AHAM, No. 4 at p.7)

DOE has redesignated existing sections 430.27(f) and (k) into 430.27(a)(2), and 431.401(e)(2) and 431.401(f)(3) into 431.401(a)(2). To clarify compliance obligations further, DOE is amending sections 430.27(a)(2) and 431.401(a)(2) to specify that, while any person may petition for waiver and interim waiver, the ultimate responsibility for complying with the waiver provisions lies with the manufacturer, which, by statutory definition, includes importers. DOE believes this additional language clarifies that the compliance burden is on the manufacturer, regardless of which entity submits the waiver. AHAM commented that it supports the additional language, which reflects AHAM's current understanding. (AHAM, No. 4 at p. 2)

DOE is restoring, with minor amendments, provisions inadvertently omitted from section 430.27(b)(1) in a separate rulemaking process. On March 7, 2011, DOE published a final rule titled “Energy Conservation Program: Certification, Compliance, and Enforcement for Consumer Products and Commercial and Industrial Equipment.” 76 FR 12422. Among other things, the rule added an electronic filing option for submitting petitions for waiver from the test procedure

requirements for consumer products located at 10 CFR 430.27. Due to a drafting oversight, the provisions formerly located at 10 CFR 430.27(b)(1)(i) through (iv), which address what must be included in a waiver petition for consumer products, were deleted from the current regulatory text. In particular, the provisions required petitioners to: (1) specify the basic model(s) to which the waiver applies; (2) identify other manufacturers of similar products; (3) include any known alternate test procedures of the basic model (4) sign the petition, and (5) include any request for confidential treatment for any information deemed confidential. AHAM commented that it supports restoring the omitted language. (AHAM, No. 4 at p. 2) This final rule adopts these provisions with a minor modification to item (3) to specify that the alternate TP(s) must be specific to the product type.

This final rule also amends sections 430.27(b)(1)(i) and 431.401(b)(1)(i) to require waiver applicants to identify each brand name under which the basic model specified in the waiver will be distributed in commerce in the U.S. This amendment does not prohibit third party representatives such as original equipment manufacturers (“OEMs”) from submitting waiver applications on behalf of an importer; however, such OEMs are required to include all brand names and applicable basic model numbers for which the waiver will apply. This requirement will assist the Department in identifying the market-based brand name of a basic model addressed by a waiver granted by DOE. This information must be identical to the information submitted in the certification report for a given basic model. AHAM commented that it did not oppose the addition of brand information as part of a waiver petition. (AHAM, No. 4 at p. 2)

In many cases, notification of all manufacturers of the same product type, as currently required, leads to over-notification. Therefore, DOE is modifying sections 430.27(c) and 431.401(c) to require petitioners to notify, on publication of the waiver or interim waiver, all other manufacturers that manufacture products in the same product or equipment class as the basic model(s) for which the petition for waiver or interim waiver was requested. If the technology or characteristic at issue in the petition is known by the petitioner to be used in multiple product classes, notification must also be sent to manufacturers of products in those other product classes. This final rule requires notification upon publication of the interim waiver, which addresses manufacturer concerns about being required to notify other manufacturers (who are also likely to be competitors of the petitioner) prior to the marketing of the basic model(s) specified in the petition. Once a manufacturer receives an interim waiver and certifies compliance to DOE, the basic model(s) covered in the interim waiver may be distributed in commerce, so competitive concerns are less likely to be an issue. AHAM commented that it supports DOE's proposal and agreed that the change to the manufacturer notification requirements should help alleviate manufacturer concerns about notifying competitors prior to the marketing of new basic models. (AHAM, No. 4 at p. 2)

DOE has redesignated existing section 430.27(i) into paragraph 430.27(d)(3), and 431.401(f)(1) into paragraph 431.401(d)(3). DOE's experience has been that providing written notification to a petitioner of DOE's decision on a request for an interim waiver within 15 business days of receiving the petition is often not feasible. Therefore, DOE proposed to amend sections 430.27(e)(1) and 431.401(e)(1) to state that, if administratively feasible, DOE will notify an applicant in writing of the disposition of the petition for interim waiver within 30

business days of receipt of the petition. AHAM opposed DOE lengthening the time for a decision on a petition for interim waiver. (AHAM, No. 4 at p. 3) AHAM commented that the waiver and interim waiver processes take too long and that DOE should attempt to shorten the process. (AHAM, No. 4 at p. 3) AHAM also commented that manufacturers seeking waivers need swift decisions to bring products to market and that further delay by DOE prevents timely introduction of products to market. (AHAM, No. 4 at p. 3)

DOE recognizes the importance of timely processing of waiver applications and will continue to notify applicants of its decisions on interim waivers as soon as possible. Similarly, a manufacturer should petition for a waiver as soon as it realizes that a design (possibly a prototype) either cannot be tested under the DOE test procedure or that the test procedure yields results that are not representative of the model's actual energy consumption. In addition, manufacturers may speed processing of their petitions by providing all of the required information, including proposing a complete, alternative test method at the time the initial application is submitted. Submission of any relevant test data would also be helpful. Manufacturers may also facilitate review by providing an explanation of why the proposed test method more accurately represents the energy consumption of the basic model. Many of the delays in processing arise from iterative efforts by the Department to obtain sufficient information upon which to base a decision to grant an interim waiver. More importantly, the Department has an obligation to ensure that alternative test methods authorized by the Department yield measurements of energy consumption that are representative of actual performance. Such a determination requires careful analysis and sometimes requires testing by DOE even if the manufacturer provides test data with their submission. DOE has found that 15

days is not typically sufficient to perform the necessary review and is amending the regulation to set forth a time frame that is more likely to be feasible. In addition, because manufacturers routinely represent that their product development cycles are often in excess of a year, DOE concludes that 30 business days is a reasonable time frame for review of a petition for an alternative test method. Accordingly, DOE is amending sections 430.27(e)(1) and 431.401(e)(1) to state that, if administratively feasible, DOE will notify an applicant in writing of the disposition of the petition for interim waiver within 30 business days of receipt of the petition. DOE encourages manufacturers to submit a petition early to avoid any impact on product release and expects that the modification to the notification requirements (discussed above) will facilitate early submittal of petitions to the Department by eliminating some of the concerns related to advance notification of competitors.

In the NOPR, DOE proposed to amend existing sections 430.27(h) and 431.401(e)(4) (which are now sections 430.27(h)(1) and 431.401(h)(1)) to specify that an interim waiver expires within one (1) year of issuance unless either of the following occurs first: 1) DOE publishes a final decision and order in the Federal Register; or 2) DOE publishes a new or amended test procedure that addresses the issues presented in the waiver, and manufacturers are required to use that test procedure to demonstrate compliance with the applicable standard. 77 FR 74618. AHAM opposed the proposal to extend the expiration date of interim waivers. (AHAM, No. 4 at p. 3) AHAM urged DOE to complete the waiver process in a more timely fashion to avoid delaying the time to market. (AHAM, No. 4 at p. 3) AHAM acknowledged that it could decrease manufacturer burden in cases where an extension of an interim waiver is necessary, but emphasized that keeping the timeline as short as possible is more important,

saying that the best way to mitigate manufacturer burden is to make an extension of an interim waiver unnecessary by issuing a final decision and order. (AHAM, No. 4 at p. 3)

DOE will continue to process petitions for waivers as quickly as possible and notes that the 1-year time period is not significantly different from the existing regulatory provisions specifying that an interim waiver is valid for 180 days but can be extended for an additional 180 days. As discussed below, DOE is clarifying in this rule that testing of a basic model conducted under an interim waiver is valid for certification of compliance, alleviating AHAM's concern that any additional time needed for DOE to issue a final decision and order will impact the ability of a manufacturer to sell a product. This amendment obviates the need for manufacturers to request an extension of the interim waiver after 180 days, while providing sufficient time for DOE to consider the issues presented in the petition and publish a decision and order or amend the test procedure to eliminate the continued need for the waiver. In response to AHAM's comment, DOE is amending sections 430.27(h)(1) and 431.401(h)(1) to provide that if DOE has not, within the 1-year period, published a new or amended test procedure that addresses the issues presented in the waiver and that manufacturers are required to use to demonstrate compliance with the applicable standard, then DOE will issue a final decision and order on the petition.

DOE is adding new paragraphs 430.27(i) and 431.401(i) to specify the applicability of waivers (interim and final) with respect to determining and certifying compliance. The new paragraphs explain how manufacturers must determine the compliance of basic models subject to an interim waiver or waiver if the test procedure prescribed in the interim waiver differs from the test procedure prescribed in the subsequent decision and order on the waiver. A manufacturer

who has already certified basic models using the procedure permitted in DOE's grant of an interim test procedure waiver is not required to re-test those basic models so long as certain criteria are met. However, if specified by DOE in the decision and order, by the time of the next annual certification the manufacturer must re-test and re-certify compliance using the procedure specified by DOE in the decision and order. In addition, when DOE publishes a decision and order on a petition for waiver in the Federal Register, a manufacturer must use the test procedure contained in that decision and order to rate any basic models covered by the decision and order that have not yet been certified to DOE. Finally, the test procedure in a decision and order must be used for all future testing for any basic models covered by the decision and order. AHAM agreed that clarification of the certification process where interim waivers are involved is helpful and supported the process described above as an appropriate way to address the situation in which a subsequent decision and order differs from an interim waiver. (AHAM, No. 4 at p. 4)

DOE is redesignating existing section 430.27(j) as 430.27(f)(1). In the NOPR, DOE proposed to specify that once DOE has granted a petition for waiver for a type of product or equipment employing a particular technology, other manufacturers of that product or equipment employing a technology or characteristic that results in the same need for a waiver, as specified by DOE in the published petition for waiver in the Federal Register, must submit a petition for waiver within 60 days. (Some examples of technologies or characteristics for which multiple manufacturers have, in the past, had the same need for a waiver include large-capacity clothes washers, refrigerator-freezers that employ multiple defrost cycles, and dishwashers with a water softener regeneration system.) 77 FR 74618.

AHAM commented that it did not believe that the new provision was needed. (AHAM, No. 4 at p.4) AHAM's view is that, under the current regulations, when DOE grants a waiver, "manufacturers are already obligated to file a petition for waiver before introducing products that employ a technology or characteristic that results in the same need for a waiver." (AHAM, No. 4 at p.4) Thus, AHAM concluded that the regulatory text "introduces more confusion than clarity on what is already a well-understood concept." (AHAM, No. 4 at p.4) The current reg text does not contain an affirmative requirement to petition for a waiver based on AHAM's comment, however, DOE concludes that AHAM is not objecting to the concept, but to a lack of clarity in the proposed regulatory text. Thus, DOE is adopting the amendment, but is clarifying the regulatory text in sections 430.27(j) and 431.401(j) as discussed in more detail below to address AHAM's concerns.

AHAM questioned what DOE intended by "employ" in the proposed text: "... after DOE grants a petition for waiver for a product employing a particular technology or having a particular characteristic, any manufacturer of that product employing a technology..." (AHAM, No. 4 at p.5) AHAM asked whether it encompasses technology that a manufacturer may use in another country and could bring to market in the U.S., whether it includes technologies about to be brought to market, or whether it encompasses only technology already on the market. (AHAM, No. 4 at p.5)

AHAM also strongly opposed the 60-day limit for manufacturers to submit a petition for a waiver. (AHAM, No. 4 at p.5) AHAM raised a number of interpretive questions about how to apply the 60-day time limit. (AHAM, No. 4 at p.5) AHAM raised concerns that, although it did

not interpret the proposed language to mean that a manufacturer could be precluded from ever employing the technology in the future if it failed to petition for a waiver during the 60-day period, AHAM was concerned that the language did not preclude that interpretation. (AHAM, No. 4 at p.5) AHAM also stated that it believed that a time limit was not necessary but that, if DOE retained a time limit, then DOE should adopt a longer time limit because 60 days may not be enough time for manufacturers to evaluate whether they have the same technology or characteristics at issue. (AHAM, No. 4 at p.5) AHAM proposed 180 days as a potentially more realistic time frame. (AHAM, No. 4 at p.5)

Much of the ambiguity in DOE's proposed language, as identified by AHAM, seems to stem from the 60-day time limit and how that time limit is applied to products in development. Based on AHAM's comment, DOE is modifying the regulatory text in sections 430.27(j) and 431.401(j) to clarify that if, at the time DOE grants a petition for waiver to a particular manufacturer, other manufacturers are distributing in commerce in the United States products or equipment employing the same technologies or characteristics at issue in the waiver, those manufacturers have 60 days to petition DOE for a waiver. If a manufacturer has not yet distributed in commerce in the United States products or equipment employing the same technologies or characteristics at issue in the waiver, such manufacturer must petition for and be granted a waiver prior to distributing the product or equipment in commerce in the United States. DOE encourages manufacturers to submit petitions for waiver in the early stages of development, to avoid delays in any future distribution of the product or equipment in commerce in the United States.

Another of AHAM's concerns was that DOE should "address situations in which it is not readily apparent ... what technology or characteristic is at issue." (AHAM, No. 4 at p.5) As part of this process, DOE will state in the Federal Register notice granting the waiver the specific technology or characteristic to which this provision would apply.

DOE is redesignating existing section 430.27(k) into paragraph 430.27(a)(2). In the NOPR, DOE also proposed to add new paragraphs (now 430.27(k) and 431.401(k)) to set forth a process for manufacturers to request rescission or modification of a waiver if they determine that the waiver is no longer needed, or for other appropriate reasons. The provision creates a process for DOE to consider and, as appropriate, grant the requested rescission or modification. Subsequent to the effective date of a rescission or modification, the manufacturer would be required to use the DOE test procedure in the CFR or an alternate test procedure specified in the order establishing the modification. DOE also proposed to add language to clarify that DOE may revoke or modify a waiver or interim waiver if it determines that the factual basis underlying the petition for waiver or interim waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics. 77 FR 74618.

AHAM commented that, while it did not oppose provisions regarding rescission or modification for waivers, DOE should provide a more detailed process. (AHAM, No. 4 at p.5) For petitioner-initiated rescission or modification, AHAM suggested that DOE should clarify who can request rescission or modification, how to request rescission or modification, that a request and grant for modification must explain the change, and what criteria DOE will use in

making a decision. (AHAM, No. 4 at 6) AHAM stated that it understood the intent of the proposal to be that the only party who could request rescission or modification is the party who filed the original petition. (AHAM, No. 4 at 6) For DOE-initiated rescission or modification, AHAM suggested that DOE should clarify: the criteria DOE will evaluate when deciding whether to rescind or modify a waiver, that DOE will notify the petitioner regarding its intent to rescind or modify the waiver and allow the petitioner sufficient time to provide a response before publication in the Federal Register, that DOE will communicate a final decision to the petitioner prior to publication in the Federal Register, and an explanation of and basis for DOE's action (modification or rescission). (AHAM, No. 4 at 6)

DOE's proposed language in the NOPR states that petitioners may seek modification or rescission. To ensure that this language is clear that the original petitioner may seek a change, DOE is adding "original" before "petitioner" to the text. To address AHAM's concern that the regulation is unclear regarding how to submit a request for rescission or modification, DOE is adopting slightly modified language in paragraph (a)(3) of sections 430.27 and 431.401 to clarify that all correspondence regarding waivers, including requests for rescission or modification, should be directed to the same address(es) as petitions for waiver or interim waiver. DOE is also adopting slightly modified language in sections 430.27(k)(1) and 431.401(k)(1) that will clarify that a petitioner must, in a request for rescission, provide a statement explaining why it is requesting rescission and, in a request for modification, explain the need for modification and detail the requested modifications and the impact on measured energy consumption.

DOE's proposal also provided that DOE's determination would be based on a finding that the factual basis underlying the petition for waiver or interim waiver is incorrect, or that the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics. 77 FR 74618. The basis for a determination could be test data showing either that the information in the initial petition was incorrect or that the alternative test procedure does not, in fact, generate results that are representative of the basic models' true energy consumption characteristics. In addition, the proposed language stated that DOE's determination would consider the relevant information contained in the record and any comments received, ensuring that the basis for any determination will be public and that the petitioner's views will be considered. 77 FR 74623. DOE is adopting slightly modified text in sections 430.27(k)(3) and 431.401(k)(3) to make clear that DOE will specify the basis for its determination and, in the case of a modification, will also specify the change to the authorized test procedure.

With respect to DOE-initiated actions, AHAM's comment also suggests that it is concerned that a manufacturer may not have an opportunity to respond prior to a determination to rescind or modify a waiver. The proposed text in the NOPR stated that DOE will publish any proposed rescission or modification in the Federal Register for public comment, which would provide the petitioner and any other interested parties an opportunity to respond prior to DOE making a decision. 77 FR 74623, 74625. DOE proposed a process mirroring that of an initial petition for waiver and has revised the text in sections 430.27(k)(2) and 431.401(k)(2) to clarify that the petitioner will have an opportunity to rebut any comments. AHAM also suggested that the petitioner should receive notice of DOE's decision prior to publication in the Federal

Register; however, given the comment opportunity being provided, it is unclear what the purpose of such notification would be.

Therefore, as described above, DOE is adopting the new paragraphs 430.27(k) and 431.401(k) to set forth a process for an original petitioner to request rescission or modification of a waiver if it determines that the waiver is no longer needed, or for other appropriate reasons. The provision creates a process for DOE to consider and, as appropriate, grant the requested rescission or modification. Subsequent to the effective date of a rescission or modification, the manufacturer must use the specified DOE test procedure. The process for rescission or modification in this final rule mirrors the process for petitioning for a waiver.

Finally, in the NOPR, DOE proposed to create a simplified process to allow for petitioners to request that DOE extend the scope of a waiver or interim waiver to include additional basic models employing the same technology as the basic models set forth in the original petition. 77 FR 74618. AHAM commented that it supports the general principle but indicated that the regulation should provide more detail about the process. (AHAM, No. 4 at p.6) AHAM suggested that a manufacturer should simply need to submit a statement to DOE that the petition for waiver or interim waiver is being extended to include other specified models that employ the same technology or characteristic, and DOE should not need to make a decision. (AHAM, No. 4 at pp.6-7) AHAM suggested that such a statement could be under penalty of perjury. (AHAM, No. 4 at p.6) AHAM agreed that the statement should be published in the Federal Register. (AHAM, No. 4 at pp.6-7) AHAM also commented that such a process should be applied to both petitions for waiver and granted waivers. (AHAM, No. 4 at p.7)

AHAM's suggested approach, where manufacturers would be permitted to extend a waiver to additional models unilaterally, would not allow DOE to fulfill its responsibility to ensure that an alternative test procedure is appropriate for the new basic model(s). Therefore, DOE is adopting the simplified process in sections 430.27(g) and 431.401(g). DOE expects that the simplified process will expedite the review where a manufacturer is using the same technology for a given covered product and applying the same methods in an already established waiver. DOE is modifying the language to clarify that this process can be used to add models at any stage of the waiver process. Notice of any such extension would be published in the Federal Register.

DOE is redesignating existing section 430.27(l) as 430.27(f)(2), 430.27(m) as 430.27(l), and 431.401(g) as 431.401(l). In the NOPR, DOE also proposed to amend the existing paragraphs 430.27(m) and 431.401(g) to provide that, as soon as is practicable after DOE grants a waiver, DOE will publish a proposed rule to amend the relevant test procedure regulation to eliminate the need for the continuation of the waiver. 77 FR 74618. AHAM opposed this proposal, stating that the current regulations require DOE to amend the test procedure within one year of granting a waiver. (AHAM, No. 4 at p. 3) AHAM again emphasized the need for DOE to shorten the time for which waivers are necessary and to provide regulated parties with certainty by adhering to the one year timing requirement in the current regulations. (AHAM, No. 4 at p. 4)

DOE agrees that providing regulatory certainty is important and is committed to updating its test procedures in a timely manner, particularly to address issues raised in waiver petitions.

DOE also understands that a large number of separate test procedure rulemakings could tax manufacturer resources. Consolidating multiple waivers into one rulemaking is more efficient and less burdensome for DOE and regulated parties than opening multiple rulemakings on a staggered basis to meet an artificial one-year deadline. In addition, manufacturer certainty is maintained by the regulatory amendment stating that the decision and order remains in effect until a new test procedure addressing the waiver is published and its use is required. Therefore, DOE is amending the existing 430.27(m) and 431.401(g) (which are renumbered as 430.27(l) and 431.401(l)) as proposed.

As part of the modifications to 430.27(m) and 431.401(g) (which are renumbered 430.27(l) and 431.401(l)) and to 430.27(h) and 431.401(e)(4) (the latter is renumbered as 431.401(h)(1), DOE proposed in the NOPR to clarify that a waiver (interim, if still in effect consistent with 430.27(h) and 431.401(h)(1), or final) terminates on the date when use of the amended test procedure is required to be used by manufacturers to demonstrate compliance with the applicable energy or water conservation standard. 77 FR 74618. Continuation of the waiver until the date when use of an amended test procedure is required to demonstrate compliance, rather than the effective date of that test procedure (i.e., the date on which that procedure officially becomes part of the Code of Federal Regulations), prevents situations where a waiver has expired while the amended test procedure is effective but its use is not yet required. DOE did not receive any comments on this issue and is adopting the amendment as proposed.

To keep the regulatory text current, DOE is removing all references to the “Assistant Secretary for Conservation and Renewable Energy” in 10 CFR 430.27 and the “Assistant

Secretary for Energy Efficiency and Renewable Energy” in 10 CFR 431.401 and is replacing these terms with “DOE.”

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

Test procedure rulemakings do not constitute “significant regulatory actions” under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601, et seq.) requires preparation of a regulatory flexibility analysis (RFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by E.O. 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel’s website, <http://www.energy.gov/gc/>.

DOE reviewed the waiver requirements being proposed under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003.

DOE certified that the proposed rule, if adopted, would not have a significant impact on a substantial number of small entities. The factual basis for this certification is set forth below. DOE received no comments on the certification. Comments on the potential economic impacts of the rule, and any changes made as a result of those comments, are discussed in section III. These changes did not result in a change to the factual basis for DOE's certification.

The rule may affect small manufacturers of covered consumer products and commercial equipment. DOE does not, however, expect that the impact of the rule would be significant. The regulatory provisions proposed would clarify the effect of the waiver (the waiver does not release a manufacturer from complying with the applicable standard and certification requirements) and the responsibility for compliance with the waiver provisions (the manufacturer is responsible for the compliance regardless of who submits the petition). The rule would also specify how manufacturers would certify basic models specified in a petition for an interim waiver and waiver if the test procedure prescribed in the interim waiver differs from the test procedure prescribed in the subsequent decision and order on the waiver. The rule clarifies existing regulatory requirements and does not add new regulatory burden. The reinstatement of the provisions of 10 CFR 430.27(b)(1) that were inadvertently removed is also not expected to impose a significant regulatory burden. These provisions require petitioners to: specify the basic model(s) to which the waiver applies, identify other manufacturers of similar products, include any known alternate test procedures of the basic model, sign the petition, and include a request seeking confidential treatment for any information deemed confidential. Manufacturers have already been complying with these requirements since they were enacted on November 26, 1986. 51 FR 42826.

In addition, the new waiver requirements would require petitioners to specify the brand names under which a basic model would be sold and expand the eligibility for waivers to all types of covered equipment subject to DOE's test procedures. These requirements are not expected to result in a significant impact, as they are consistent with the purpose of the existing waiver process, which is to assist manufacturers in testing their equipment to demonstrate compliance with DOE standards. The new waiver requirements would also amend the timelines for the issuance of an interim waiver from 15 to 30 days, a provision that manufacturers can account for in their product development and marketing schedule without significant difficulty. The rule would also extend the time periods covered by an interim waiver or waiver, providing more certainty for manufacturers as they rate, certify and market their products. The rule clarifies that DOE would not change the established metric in a test procedure waiver is also not expected to result in a significant impact because the established metric is already required as a result of the applicable energy conservation standard.

DOE is also specifying that once DOE has granted a petition for waiver for a product or type of equipment employing a particular technology, other manufacturers of that product or equipment employing a technology or characteristic that results in the same need for a waiver must submit a petition for waiver within 60 days. DOE revised its proposal to clarify that the requirement applies only where manufacturers are distributing such product in commerce in the United States at the time the waiver is granted. Manufacturers who are not distributing such product in commerce in the United States at the time the waiver is granted must apply for and be granted a waiver prior to distribution in the United States, but there is no specified time

requirement for the application. DOE does not expect this requirement to impose significant additional burden because, given that the products or equipment produced by these manufacturers employ a technology that provides the same function that led DOE to grant a waiver in the first instance, these manufacturers would likely need to petition for waiver under DOE's existing regulations. This provision specifies the circumstances under which this process must be completed.

The rule sets forth a process for manufacturers to request rescission or modification of a waiver. This provision would allow manufacturers to notify DOE if they believe a previously granted waiver is no longer needed, or that rescission or modification is necessary for other appropriate reasons. The provision then sets forth the process for DOE to consider and, as appropriate, grant the request. The intent of this provision is to reduce manufacturer burden by providing a process for manufacturers to request rescission or modification of a waiver that they believe is inappropriate or unworkable. Similarly, the rule would provide a process by which DOE may revoke or modify a previously granted waiver if DOE determines that the factual basis underlying the petition for waiver or interim waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics. In such cases, the manufacturer would be required to test its products or equipment using the DOE test procedure. DOE does not believe that this provision would result in a significant impact on small manufacturers. Given that a revocation or modification is only issued if the factual basis underlying the original petition was not correct in the first instance, EPCA would already require the manufacturers to use the applicable DOE test procedure.

For the reasons stated above, DOE certifies that this final rule would not result in a significant impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE transmitted its certification to the Small Business Administration (SBA) as required by 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

The final rule contains a collection-of-information requirement that is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). DOE submitted this collection to OMB for approval, as part of DOE's information collection approved under OMB Control No. 1910-1400. Public reporting burden for the submission of a petition for waiver or interim waiver, or a request for rescission, is estimated to average *5 hours* per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

DOE continues to seek public comment regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE-5B, 1000 Independence

Avenue SW., Washington, D.C. 20585-0121 or [Amendments-Correction-2012-TP-0003@ee.doe.gov](#), and by e-mail to [OIRA_Submission@omb.eop.gov](#).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

In this final rule, DOE amends its procedures for manufacturers to seek and for DOE to grant petitions for waivers of the DOE test procedures. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this rule amends an existing rule without affecting the amount, quality or distribution of energy usage, and, therefore, will not result in any environmental impacts. Thus, this rulemaking is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D, which applies to any rulemaking that interprets or amends an existing rule without changing the environmental effect of that rule. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt

State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE examined this final rule and determined that it will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations for energy conservation for the products that are the subject of today's final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly

specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Pub. L. No. 104-4, sec. 201 (codified at 2 U.S.C. 1531). For any proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed “significant intergovernmental mandate,” and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small

governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at <http://energy.gov/gc>. DOE examined this rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of \$100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This final rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights” 53 FR 8859 (March 18, 1988), that this regulation will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the

public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use if the regulation is implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's regulatory action is not a significant regulatory action under Executive Order 12866. Moreover, it will not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of

OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; FEAA) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

Today’s final rule does not authorize or require the use of any commercial standard.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of today's rule before its effective date. The report will state that it has been determined that the rule is not a “major rule” as defined by 5 U.S.C. 804(2).

N.

Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects

10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Small businesses.

10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on May 2, 2014.

Kathleen B. Hogan
Deputy Assistant Secretary for Energy Efficiency
Energy Efficiency and Renewable Energy

For the reasons stated in the preamble, DOE amends parts 430 and 431 of Chapter II of Title 10, Code of Federal Regulations as set forth below:

PART 430--ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291-6309; 28 U.S.C. 2461 note.

2. Section 430.27 is revised to read as follows:

§ 430.27 Petitions for waiver and interim waiver.

(a) *General information.* This section provides a means for seeking waivers of the test procedure requirements of this subpart for basic models that meet the requirements of paragraph (a)(1) of this section. In granting a waiver or interim waiver, DOE will not change the energy use or efficiency metric that the manufacturer must use to certify compliance with the applicable energy conservation standard and to make representations about the energy use or efficiency of the covered product. The granting of a waiver or interim waiver by DOE does not exempt such basic models from any other regulatory requirement contained in this part or the certification and compliance requirements of 10 CFR part 429 and specifies an alternative method for testing the basic models addressed in the waiver.

(1) Any interested person may submit a petition to waive for a particular basic model any requirements of §430.23 or of any appendix to this subpart, upon the grounds that the basic model contains one or more design characteristics which either prevent testing of the basic model according to the prescribed test procedures or cause the prescribed test procedures to evaluate the basic model in a manner so unrepresentative of its true energy and/or water consumption characteristics as to provide materially inaccurate comparative data.

(2) Manufacturers of basic model(s) subject to a waiver or interim waiver are responsible for complying with the other requirements of this subpart and with the requirements of 10 CFR part 429 regardless of the person that originally submitted the petition for waiver and/or interim waiver. The filing of a petition for waiver and/or interim waiver shall not constitute grounds for noncompliance with any requirements of this subpart.

(3) All correspondence regarding waivers and interim waivers must be submitted to DOE either electronically to AS_Waiver_Requests@ee.doe.gov (preferred method of transmittal) or by mail to U.S. Department of Energy, Building Technologies Program, Test Procedure Waiver, 1000 Independence Avenue, SW, Mailstop EE-5B, Washington, DC 20585-0121.

(b) *Petition content and publication.* (1) Each petition for waiver must:

(i) Identify the particular basic model(s) for which a waiver is requested, each brand name under which the identified basic model(s) will be distributed in commerce, the design characteristic(s) constituting the grounds for the petition, and the specific requirements sought to be waived, and must discuss in detail the need for the requested waiver;

(ii) Identify manufacturers of all other basic models distributed in commerce in the United States and known to the petitioner to incorporate design characteristic(s) similar to those found in the basic model that is the subject of the petition;

(iii) Include any alternate test procedures known to the petitioner to evaluate the performance of the product type in a manner representative of the energy and/or water consumption characteristics of the basic model; and

(iv) Be signed by the petitioner or an authorized representative. In accordance with the provisions set forth in 10 CFR 1004.11, any request for confidential treatment of any information contained in a petition for waiver or in supporting documentation must be accompanied by a copy of the petition, application or supporting documentation from which the information claimed to be confidential has been deleted. DOE will publish in the **Federal Register** the petition and supporting documents from which confidential information, as determined by DOE, has been deleted in accordance with 10 CFR 1004.11 and will solicit comments, data and information with respect to the determination of the petition.

(2) Each petition for interim waiver must reference the related petition for waiver by identifying the particular basic model(s) for which a waiver is being sought. Each petition for interim waiver must demonstrate likely success of the petition for waiver and address what economic hardship and/or competitive disadvantage is likely to result absent a favorable determination on the petition for interim waiver. Each petition for interim waiver must be signed by the petitioner or an authorized representative.

(c) *Notification to other manufacturers.* (1) Each petitioner for interim waiver must, upon publication of a grant of an interim waiver in the **Federal Register**, notify in writing all known manufacturers of domestically marketed basic models of the same product class (as specified in 10 CFR 430.32) and of other product classes known to the petitioner to use the technology or have the characteristic at issue in the waiver. The notice must include a statement that DOE has published the interim waiver and petition for waiver in the **Federal Register** and the date the

petition for waiver was published. The notice must also include a statement that DOE will receive and consider timely written comments on the petition for waiver. Within five working days, each petitioner must file with DOE a statement certifying the names and addresses of each person to whom a notice of the petition for waiver has been sent.

(2) If a petitioner does not request an interim waiver and notification has not been provided pursuant to paragraph (c)(1) of this section, each petitioner, after filing a petition for waiver with DOE, and after the petition for waiver has been published in the **Federal Register**, must, within five working days of such publication, notify in writing all known manufacturers of domestically marketed units of the same product class (as listed in 10 CFR 430.32) and of other product classes known to the petitioner to use the technology or have the characteristic at issue in the waiver. The notice must include a statement that DOE has published the petition in the **Federal Register** and the date the petition for waiver was published. Within five working days of the publication of the petition in the **Federal Register**, each petitioner must file with DOE a statement certifying the names and addresses of each person to whom a notice of the petition for waiver has been sent.

(d) *Public comment and rebuttal.* (1) Any person submitting written comments to DOE with respect to an interim waiver must also send a copy of the comments to the petitioner by the deadline specified in the notice.

(2) Any person submitting written comments to DOE with respect to a petition for waiver must also send a copy of such comments to the petitioner.

(3) A petitioner may, within 10 working days of the close of the comment period specified in the **Federal Register**, submit a rebuttal statement to DOE. A petitioner may rebut more than one comment in a single rebuttal statement.

(e) *Provisions specific to interim waivers*—(1) Disposition of application. If administratively feasible, DOE will notify the applicant in writing of the disposition of the petition for interim waiver within 30 business days of receipt of the application. Notice of DOE's determination on the petition for interim waiver will be published in the **Federal Register**.

(2) Criteria for granting. DOE will grant an interim waiver from the test procedure requirements if it appears likely that the petition for waiver will be granted and/or if DOE determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver.

(f) *Provisions specific to waivers*—(1) Disposition of application. The petitioner shall be notified in writing as soon as practicable of the disposition of each petition for waiver. DOE shall issue a decision on the petition as soon as is practicable following receipt and review of the Petition for Waiver and other applicable documents, including, but not limited to, comments and rebuttal statements.

(2) Criteria for granting. DOE will grant a waiver from the test procedure requirements if DOE determines either that the basic model(s) for which the waiver was requested contains a design characteristic that prevents testing of the basic model according to the prescribed test procedures, or that the prescribed test procedures evaluate the basic model in a manner so unrepresentative of its true energy or water consumption characteristics as to provide materially inaccurate comparative data. Waivers may be granted subject to conditions, which may include adherence to alternate test procedures specified by DOE. DOE will consult with the Federal Trade Commission prior to granting any waiver, and will promptly publish in the **Federal Register** notice of each waiver granted or denied, and any limiting conditions of each waiver granted.

(g) *Extension to additional basic models.* A petitioner may request that DOE extend the scope of a waiver or an interim waiver to include additional basic models employing the same technology as the basic model(s) set forth in the original petition. DOE will publish any such extension in the **Federal Register**.

(h) *Duration.* (1) Within one year of issuance of an interim waiver, DOE will either:

(i) Publish in the **Federal Register** a determination on the petition for waiver; or

(ii) Publish in the **Federal Register** a new or amended test procedure that addresses the issues presented in the waiver.

(2) When DOE amends the test procedure to address the issues presented in a waiver, the waiver will automatically terminate on the date on which use of that test procedure is required to demonstrate compliance.

(i) *Compliance certification.* (1) If the alternate test procedure specified in the interim waiver differs from the alternate test procedure specified by DOE in a subsequent decision and order granting the petition for waiver, a manufacturer who has already certified basic models using the procedure permitted in DOE's grant of an interim test procedure waiver is not required to re-test and re-rate those basic models so long as: the manufacturer used that alternative procedure to certify the compliance of the basic model after DOE granted the company's interim waiver request; changes have not been made to those basic models that would cause them to use more energy or otherwise be less energy efficient; and the manufacturer does not modify the certified rating. However, if the alternate test procedure specified in the interim waiver differs from the alternate test procedure specified by DOE in a subsequent decision and order granting the petition for waiver and if specified by DOE in the decision and order, the manufacturer must

re-test and re-certify compliance using the procedure specified by DOE in the decision and order by the time of the next annual certification.

(2) After DOE publishes a decision and order in the **Federal Register**, a manufacturer must use the test procedure contained in that notice to rate any basic models covered by the waiver that have not yet been certified to DOE and for any future testing in support of the certification for the basic model(s) while the waiver is valid.

(j) *Petition for waiver required of other manufacturers.* Within 60 days after DOE issues a waiver to a manufacturer for a product employing a particular technology or having a particular characteristic, any manufacturer currently distributing in commerce in the United States a product employing a technology or characteristic that results in the same need for a waiver (as specified by DOE in the published decision and order on the petition in the **Federal Register**) must submit a petition for waiver pursuant to the requirements of this section.. Manufacturers not currently distributing such products in commerce in the United States must petition for and be granted a waiver prior to distribution in commerce in the United States. Manufacturers may also submit a request for interim waiver pursuant to the requirements of this section.

(k) *Rescission or modification.* (1) DOE may rescind or modify a waiver or interim waiver at any time upon DOE's determination that the factual basis underlying the petition for waiver or interim waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic model(s)' true energy consumption characteristics. Waivers and interim waivers are conditioned upon the validity of statements, representations, and documents provided by the requestor; any evidence that the original grant of a waiver or interim waiver was based upon inaccurate information will weigh against

continuation of the waiver. DOE's decision will specify the basis for its determination and, in the case of a modification, will also specify the change to the authorized test procedure.

(2) A person may request that DOE rescind or modify a waiver or interim waiver issued to that person if the person discovers an error in the information provided to DOE as part of its petition, determines that the waiver is no longer needed, or for other appropriate reasons. In a request for rescission, the requestor must provide a statement explaining why it is requesting rescission. In a request for modification, the requestor must explain the need for modification to the authorized test procedure and detail the modifications needed and the corresponding impact on measured energy consumption.

(3) DOE will publish a proposed rescission or modification (DOE-initiated or at the request of the original requestor) in the **Federal Register** for public comment. A requestor may, within 10 working days of the close of the comment period specified in the proposed rescission or modification published in the **Federal Register**, submit a rebuttal statement to DOE. A requestor may rebut more than one comment in a single rebuttal statement.

(4) DOE will publish its decision in the **Federal Register**. DOE's determination will be based on relevant information contained in the record and any comments received.

(5) After the effective date of a rescission, any basic model(s) previously subject to a waiver must be tested and certified using the applicable DOE test procedure in 10 CFR part 430.

(1) *Revision of regulation.* As soon as practicable after the granting of any waiver, DOE will publish in the **Federal Register** a notice of proposed rulemaking to amend its regulations so as to eliminate any need for the continuation of such waiver. As soon thereafter as practicable, DOE will publish in the **Federal Register** a final rule.

(m) To exhaust administrative remedies, any person aggrieved by an action under this section must file an appeal with the DOE's Office of Hearings and Appeals as provided in 10 CFR part 1003, subpart C.

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

3. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6311–6317.

4. Section 431.2 is amended by revising the definition of “Private labeler” to read as follows:

§ 431.2 Definitions.

* * * * *

Private labeler means, with respect to any product covered under this part, an owner of a brand or trademark on the label of a covered product which bears a private label. A covered product bears a private label if:

- (1) Such product (or its container) is labeled with the brand or trademark of a person other than a manufacturer of such product;
- (2) The person with whose brand or trademark such product (or container) is labeled has authorized or caused such product to be so labeled; and
- (3) The brand or trademark of a manufacturer of such product does not appear on such label.

* * * * *

5. Section 431.401 is revised to read as follows:

§ 431.401 Petitions for waiver and interim waiver.

(a) *General information.* This section provides a means for seeking waivers of the test procedure requirements of this part for basic models that meet the requirements of paragraph (a)(1) of this section. In granting a waiver or interim waiver, DOE will not change the energy use or efficiency metric that the manufacturer must use to certify compliance with the applicable energy conservation standard and to make representations about the energy use or efficiency of the covered equipment. The granting of a waiver or interim waiver by DOE does not exempt such basic models from any other regulatory requirement contained in this part or the certification and compliance requirements of 10 CFR part 429 and specifies an alternative method for testing the basic model(s) addressed in the waiver.

(1) Any interested person may submit a petition to waive for a particular basic model the requirements of any uniform test method contained in this part, upon the grounds that either the basic model contains one or more design characteristics that prevent testing of the basic model according to the prescribed test procedures or cause the prescribed test procedures to evaluate the basic model in a manner so unrepresentative of its true energy or water consumption characteristics as to provide materially inaccurate comparative data.

(2) Manufacturers of basic model(s) subject to a waiver or interim waiver are responsible for complying with the other requirements of this part and with the requirements of 10 CFR part 429 regardless of the person that originally submitted the petition for waiver and/or interim waiver. The filing of a petition for waiver and/or interim waiver shall not constitute grounds for noncompliance with any requirements of this part.

(3) All correspondence regarding waivers and interim waivers must be submitted to DOE either electronically to AS_Waiver_Requests@ee.doe.gov (preferred method of transmittal) or

by mail to U.S. Department of Energy, Building Technologies Program, Test Procedure Waiver, 1000 Independence Avenue, SW, Mailstop EE-5B, Washington, DC 20585-0121.

(b) *Petition content and publication.* (1) Each petition for waiver must:

(i) Identify the particular basic model(s) for which a waiver is requested, each brand name under which the identified basic model(s) will be distributed in commerce, the design characteristic(s) constituting the grounds for the petition, and the specific requirements sought to be waived, and must discuss in detail the need for the requested waiver;

(ii) Identify manufacturers of all other basic models distributed in commerce in the United States and known to the petitioner to incorporate design characteristic(s) similar to those found in the basic model that is the subject of the petition;

(iii) Include any alternate test procedures known to the petitioner to evaluate the performance of the equipment type in a manner representative of the energy and/or water consumption characteristics of the basic model; and

(iv) Be signed by the petitioner or an authorized representative. In accordance with the provisions set forth in 10 CFR 1004.11, any request for confidential treatment of any information contained in a petition for waiver or in supporting documentation must be accompanied by a copy of the petition, application or supporting documentation from which the information claimed to be confidential has been deleted. DOE will publish in the **Federal Register** the petition and supporting documents from which confidential information, as determined by DOE, has been deleted in accordance with 10 CFR 1004.11 and will solicit comments, data and information with respect to the determination of the petition.

(2) Each petition for interim waiver must reference the related petition for waiver by identifying the particular basic model(s) for which a waiver is being sought. Each petition for

interim waiver must demonstrate likely success of the petition for waiver and address what economic hardship and/or competitive disadvantage is likely to result absent a favorable determination on the petition for interim waiver. Each petition for interim waiver must be signed by the petitioner or an authorized representative.

(c) *Notification to other manufacturers.* (1) Each petitioner for interim waiver must, upon publication of a grant of an interim waiver in the **Federal Register**, notify in writing all known manufacturers of domestically marketed basic models of the same equipment class (as specified in the relevant subpart of 10 CFR part 431), and of other equipment classes known to the petitioner to use the technology or have the characteristic at issue in the waiver. The notice must include a statement that DOE has published the interim waiver and petition for waiver in the **Federal Register** and the date the petition for waiver was published. The notice must also include a statement that DOE will receive and consider timely written comments on the petition for waiver. Within five working days, each petitioner must file with DOE a statement certifying the names and addresses of each person to whom a notice of the petition for waiver has been sent.

(2) If a petitioner does not request an interim waiver and notification has not been provided pursuant to paragraph (c)(1) of this section, each petitioner, after filing a petition for waiver with DOE, and after the petition for waiver has been published in the **Federal Register**, must, within five working days of such publication, notify in writing all known manufacturers of domestically marketed basic models of the same equipment class (as listed in the relevant subpart of 10 CFR part 431), and of other equipment classes known to the petitioner to use the technology or have the characteristic at issue in the waiver. The notice must include a statement that DOE has published the petition in the **Federal Register** and the date the petition for waiver

was published. Within five working days of the publication of the petition in the **Federal Register**, each petitioner must file with DOE a statement certifying the names and addresses of each person to whom a notice of the petition for waiver has been sent.

(d) *Public comment and rebuttal.* (1) Any person submitting written comments to DOE with respect to an interim waiver must also send a copy of the comments to the petitioner by the deadline specified in the notice.

(2) Any person submitting written comments to DOE with respect to a petition for waiver must also send a copy of such comments to the petitioner.

(3) A petitioner may, within 10 working days of the close of the comment period specified in the **Federal Register**, submit a rebuttal statement to DOE. A petitioner may rebut more than one comment in a single rebuttal statement.

(e) Provisions specific to interim waivers—(1) Disposition of application. If administratively feasible, DOE will notify the applicant in writing of the disposition of the petition for interim waiver within 30 business days of receipt of the application. Notice of DOE's determination on the petition for interim waiver will be published in the **Federal Register**.

(2) Criteria for granting. DOE will grant an interim waiver from the test procedure requirements if it appears likely that the petition for waiver will be granted and/or if DOE determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver.

(f) *Provisions specific to waivers*—(1) Disposition of application. The petitioner shall be notified in writing as soon as practicable of the disposition of each petition for waiver. DOE shall issue a decision on the petition as soon as is practicable following receipt and review of the

Petition for Waiver and other applicable documents, including, but not limited to, comments and rebuttal statements.

(2) *Criteria for granting.* DOE will grant a waiver from the test procedure requirements if DOE determines either that the basic model(s) for which the waiver was requested contains a design characteristic that prevents testing of the basic model according to the prescribed test procedures, or that the prescribed test procedures evaluate the basic model in a manner so unrepresentative of its true energy or water consumption characteristics as to provide materially inaccurate comparative data. DOE may grant a waiver subject to conditions, which may include adherence to alternate test procedures specified by DOE. DOE will promptly publish in the **Federal Register** notice of each waiver granted or denied, and any limiting conditions of each waiver granted.

(g) *Extension to additional basic models.* A petitioner may request that DOE extend the scope of a waiver or an interim waiver to include additional basic models employing the same technology as the basic model(s) set forth in the original petition. DOE will publish any such extension in the **Federal Register**.

(h) *Duration.* (1) Within one year of issuance of an interim waiver, DOE will either:

(i) Publish in the **Federal Register** a determination on the petition for waiver; or

(ii) Publish in the **Federal Register** a new or amended test procedure that addresses the issues presented in the waiver.

(2) When DOE amends the test procedure to address the issues presented in a waiver, the waiver will automatically terminate on the date on which use of that test procedure is required to demonstrate compliance.

(i) *Compliance Certification.* (1) If the alternate test procedure specified in the

interim waiver differs from the alternate test procedure specified by DOE in a subsequent decision and order granting the petition for waiver, a manufacturer who has already certified basic models using the procedure permitted in DOE's grant of an interim test procedure waiver is not required to re-test and re-rate those basic models so long as: the manufacturer used that alternative procedure to certify the compliance of the basic model after DOE granted the company's interim waiver request; changes have not been made to those basic models that would cause them to use more energy or otherwise be less energy efficient; and the manufacturer does not modify the certified rating. However, if the alternate test procedure specified in the interim waiver differs from the alternate test procedure specified by DOE in a subsequent decision and order granting the petition for waiver and if specified by DOE in the decision and order, the manufacturer must re-test and re-certify compliance using the procedure specified by DOE in the decision and order by the time of the next annual certification.

(2) After DOE publishes a decision and order in the **Federal Register**, a manufacturer must use the test procedure contained in that notice to rate any basic models covered by the waiver that have not yet been certified to DOE and for any future testing of any basic model(s) covered by the decision and order.

(j) *Petition for waiver required of other manufactures.* Within 60 days after DOE issues a waiver to a manufacturer for equipment employing a particular technology or having a particular characteristic, any manufacturer currently distributing in commerce in the United States equipment employing a technology or characteristic that results in the same need for a waiver (as specified by DOE in the published decision and order on the petition in the **Federal Register**) must submit a petition for waiver pursuant to the requirements of this section. Manufacturers not currently distributing such equipment in commerce in the United States must petition for and be

granted a waiver prior to distribution in commerce in the United States. Manufacturers may also submit a request for interim waiver pursuant to the requirements of this section.

(k) *Rescission or modification.* (1) DOE may rescind or modify a waiver or interim waiver at any time upon DOE's determination that the factual basis underlying the petition for waiver or interim waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic model(s)' true energy consumption characteristics. Waivers and interim waivers are conditioned upon the validity of statements, representations, and documents provided by the requestor; any evidence that the original grant of a waiver or interim waiver was based upon inaccurate information will weigh against continuation of the waiver. DOE's decision will specify the basis for its determination and, in the case of a modification, will also specify the change to the authorized test procedure.

(2) A person may request that DOE rescind or modify a waiver or interim waiver issued to that person if the person discovers an error in the information provided to DOE as part of its petition, determines that the waiver is no longer needed, or for other appropriate reasons. In a request for rescission, the requestor must provide a statement explaining why it is requesting rescission. In a request for modification, the requestor must explain the need for modification to the authorized test procedure and detail the modifications needed and the corresponding impact on measured energy consumption.

(3) DOE will publish a proposed rescission or modification (DOE-initiated or at the request of the original requestor) in the **Federal Register** for public comment. A requestor may, within 10 working days of the close of the comment period specified in the proposed rescission or modification published in the **Federal Register**, submit a rebuttal statement to DOE. A requestor may rebut more than one comment in a single rebuttal statement.

(4) DOE will publish its decision in the **Federal Register**. DOE's determination will be based on relevant information contained in the record and any comments received.

(5) After the effective date of a rescission, any basic model(s) previously subject to a waiver must be tested and certified using the applicable DOE test procedure in 10 CFR part 431.

(l) *Revision of regulation.* As soon as practicable after the granting of any waiver, DOE will publish in the **Federal Register** a notice of proposed rulemaking to amend its regulations so as to eliminate any need for the continuation of such waiver. As soon thereafter as practicable, DOE will publish in the **Federal Register** a final rule.

(m) To exhaust administrative remedies, any person aggrieved by an action under this section must file an appeal with the DOE's Office of Hearings and Appeals as provided in 10 CFR part 1003, subpart C.

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